See also *In re Kotzab*, 217 F.3d 1365, 1371, 55 USPQ2d 1313, 1318 (Fed. Cir. 2000) (Court *reversed* obviousness rejection involving technologically simple concept because there was no finding as to the principle or specific understanding within the knowledge of a skilled artisan that would have motivated the skilled artisan to make the claimed invention; Al-Site Corp. v. VSI Int'l Inc., 174 F.3d 1308, 50 USPQ2d 1161 (Fed. Cir. 1999)(The level of skill in the art cannot be relied upon to provide the suggestion to combine references.). MPEP page 2100-124.

- To establish *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest ALL the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must be based on the applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991). MPEP 2142 pp2100-121.
- The examiner cannot use impermissible hindsight to create my invention.

## MPEP Section 2143 – Three Part Test for Obviousness

**1. Suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or combine reference teachings.**

**Primary Prior Art Reference- DeBillis (5836654)**

1. Primary reference has ***NO*** suggestion or motivation to take the wheelchair seat and convert to pet cushion as described in applicant's claim 27.
2. The motivation to take a wheelchair cushion, with rigid, contoured, sheet-like seat pan (12), and fluid filled pouch (40) and covert to snuggly dog bed is not obvious.
3. Uses a hydrophobic fabric cover in a shower cap design.

Definition of *hydrophobic*: lacking affinity for water (Webster's New Collegiate Dictionary). Hydrophobic does not guarantee waterproof. Furthermore, the shower cap design would clearly NOT be waterproof since water or liquid could enter from the bottom area not covered by the 'shower cap" design. Applicant teaches a completely different design of cover.

- Uses an elastomeric envelope.
  Definition of *elastomeric:* any of various elastic substances resembling rubber (Webster's New Collegiate Dictionary. A rubber substance would not be breathable. Applicant teaches a waterproof, breathable material.

**Secondary Prior Art Reference – Feibus ( 5685257)**

- Secondary reference has ***NO*** suggestion or motivation to take the Pet Support Cushion and covert the absorbing function of the cover and first intermediate layer into a non-absorbing pet bed as taught by the applicant.

**Combining Primary and Secondary Prior Art**

- Structure and function completely different
  1. Last thing a wheelchair cushion wants is to absorb liquids as taught in Feibus Pet Support Cushion
  2. The primary function of the Fiebus pet cushion is to absorb liquid. The primary purpose of the outer cover and the foam layer is stated to be "absorbent".

**Conclusion:** There is no suggestion or motivation to modify the reference or combine reference teachings.

## 2. There must be a reasonable expectation of success.

**Primary Prior Art Reference- DeBillis (5836654)**

- *Waterproof:* to prevent permeation of water (Webster's New Collegiate Dictionary)
- *Breathable:* allowing air to pass through (Webster's New Collegiate Dictionary)
- *Hydrophilic:* having a strong affinity for water. (Webster's New Collegiate Dictionary)
- *Hydrophobic*: lacking affinity for water (Webster's New Collegiate Dictionary).

- *"Philic":* having a strong affinity for: loving (Webster's New Collegiate Dictionary)
- *"Phobic":* lacking an affinity for (Webster's New Collegiate Dictionary)
- Waterproof, breathable material as taught in the applicant's invention achieves the waterproof, breathable function by:
  1. a laminate (hydrophilic, microporous, or bi-component)
  2. a coating (hydrophilic, microporous, or bi-component)
  3. fabrication from a microfiber of a sufficiently close weave to be waterproof and breathable
  4. monolithic membrane
  5. MVT material comprised of a close-weave fabric of a sufficiently close weave to be waterproof and breathable
- The waterproof, breathable material, as taught by the applicant's invention, is completely sealed around the slow recovery, porous, visco-elastic foam padding layer, and the supporting layer. By the function of the waterproof, breathable material, it does not require an air vent to breathe when completely sealed around the two foam layers, yet is *completely* waterproof.
- DeBillis teaches an elastomeric material. As per the definition of elastomeric- it is a various elastic substance resembling rubber. Rubber is not breathable.
- DeBillis teaches at least one air vent in order to 'breathe" since the elastomeric material is not breathable. An air vent would allow liquids to enter cushion, thereby, rendering the cushion NOT waterproof. THE MEANS PLUS FUNCTION IS COMPLETELY DIFFERENT!
- DeBillis teaches "a shower cap-like cover" of a hydrophobic material. Hydrophobic does not guarantee waterproof. Furthermore, the shower cap design would clearly NOT be waterproof since water or liquid could enter from the bottom area not covered by the 'shower cap" design thereby not being impervious to water as defined by waterproof.
- DeBillis teaches a 'hydrophobic" material. The applicant teaches a "hydrophilic" material. By definition (phobic- lacking an affinity for; philic: having a strong affinity for) these materials have completely OPPOSITE functions! For additional proof, see Exhibit A: fabric label for a waterproof breathable material (currently available in today's marketplace) which is hydrophilic as taught by the applicant. THE MEANS PLUS FUNCITON IS COMPLETELY DIFFERENT!

- Finally, DeBillis gives the following specifications for the foam:

  "A high resiliency foam which has the softness that measures less than 100lbs using the Indention Load Force Deflection (I.L.D.) test at 25% over 50 square inch area (ASTM D357), and most preferable the I.L.D. is about 20 lbs. at 25% to about 60 lbs. at 65%."

  See signed document, Exhibit B, from a foam fabricator stating: "There is *NO* slow recovery visco-elastic foam (memory foam) of any formulation currently available on the market today that can fulfill these specifications". Since it is impossible to create the DeBillis specifications with slow-recover visco elastic foam (as taught by the applicant), there would be no expectation of success.

**Secondary Prior Art Reference – Feibus ( 5685257)**

- Feibus teaches an liquid absorbing pet bed. The first intermediate layer is formed from at least one sheet of absorbent polypropylene material preferably of a foam nature. Purpose of the foam is to be an absorbing material for liquids. Completely and totally opposite function than the applicant's invention. Applicant teaches: "said protective liner *preventing* the absorption of liquids from the domestic pet into the said visco-elastic foam padding layer and into the bottom of said supporting layer". My waterproof/breathable liner *prevents* absorbing of liquids into the foam layers. THE MEANS PLUS FUNCTION IS COMPLETELY DIFFERENT!

- If considering the cover *only* in the Feibus prior art, Feibus teaches:

  "Preferably, the covering layer is formed from an absorbent, static-dissipating, non-toxic and hypoallergenic material. It is preferred that the covering be formed from CONSORB.RTM., a textile material which is primarily used as a reusable surgical towel."

  - The applicant's invention is not concerned with any of these functions; in fact it would be preferable that the cover NOT absorb liquid. Applicant does not teach any specific material such as CONSORB.

- Secondly, if considering the cover only, the cover is functionally different in the two inventions:
  1. Fiebus teaches: "having a cover 12 fastened to a binding 14 by stitches 16." "the cushion further includes a binding (14) extending around all the layers and being stitched to the first and second covering layers." Also, "where such the PAD would be washed and rewashed several time over its life span".

  2. Applicant teaches: "said outer fabric cover has a releasable closure so that said fabric cover may be removed from the said padding of slow recovery visco-elastic foam, said padding of stabilizing support material, and said protective liner, for washing".

Fiebus teaches washing the entire cushion since the cover may not be removed. The applicant teaches a removable cover which is washed separately from the cushion. Washing the applicant's entire cushion would ruin the orthopedic pet cushion taught by the applicant. Thereby no reasonable expectation of success.

- Debillis argues that the differences in their patent that are vital compared to other prior art and thus should be granted a patent over the prior art references:
  1. In U.S Pat. No. 5,189,747 to Mundy et al.. . "the foam cushion assembly is formed with a recess or pocket to receive an insert which can take the form of either a visco-elastic foam or fluid pouch". . ".The limitation with this system is that . . . the seat assembly is achieved by a bulky combination of shaped foams of differing density."
     **Response:** Mine specifically teaches two foam layers, a visco-elastic foam layer and a supporting foam layer. Mine would create a bulky cushion contrary to DeBillis's teaching thus no reasonable expectation of success.

  2. "In U.S. Pat. No. 3.987,507 to Hall, a three-layer foam cushion is employed which has three round foam inserts of lower density than the surrounding foam which is place in recesses in a central foam layer, U.S.Patent to Morell also

discloses a foam pad having cutout sections wherein inserts of lower density are placed. Both of these patents do provide additional support around the critical ischial and coccyx anatomical areas; however, being large foam sandwiches, they do not solve the problems of added seat-to floor height, nor bulk and weight problems."

**Response:** Mine uses a lower density foam (slow recover-visco elastic foam) and is a "foam sandwich" with the two layers of foam - slow recovery visco-elastic foam combined with the support foam. Mine would create problems of added seat- to floor height, bulk, and undesirable weight problems contrary to DeBillis's teaching thus no reasonable expectation of success.

**Conclusion:** There is no reasonable expectation of success in either prior art references, singly or combined.

**3. The prior art references (or references) when combined must teach or suggest ALL of the claim limitations.**

- Neither reference teaches ***specifically*** a "waterproof, breathable material" as taught by the applicant. Must teach ALL claim limitations.

  DeBellis teaches:

  1. Hydrophobic material – no reference to breathable. Hydrophobic does not guarantee waterproof.
  2. Elastomeric material- any of various elastic substance resembling rubber (Webster New Collegiate Dictionary). Rubber is not breathable.

  Feibus teaches:

  1. Absorbent fabric
  2. Absorbent polypropylene material, preferably foam
  3. Polyester staple material, preferably batting
  4. Impermeable sheet, preferably plastic having covered fluid-filled cavities

- Neither reference teach the same components as the applicant:

  DeBellis teaches:

  1. Outer cover 60 made of hydrophobic material. Shower cap design.
  2. Next inner layer 50 is elastometric (rubber like) envelope, wrinkled on top 59,
  3. foam insert 40a visco elastic foam ischia support INSERT on top
  4. surrounding foam member 30,
  5. ALL resting on relatively rigid seat base 12 is preferably anatomically contoured on its top or upwardly facing surface 20.
  6. All mounted together

  Feibus teaches:

  1. Outer cover 12 & 30 are formed from CONSORB anti-static and absorbent fabric
  2. First layer 18 & 28, formed of an absorbent, polypropylene material, preferably of a foam nature
  3. next layer 20 & 26, formed from a polyester staple fill material, preferably some form of batting, to provide loft and cushioning to the cushion.
  4. Center layer 22, fluid impermeable sheet, preferably plastic, having a plurality of covered, fluid-fill cavities.
  5. Since inner layer 22 is fluid-impermeable, fluids which enter the cushion through the outer layer 12 are blocked from seeping through the second outer layer 30, and vise versa. Therefore if the cushion is wetted on one site, it will remain dry on the other.

- Neither reference has the same function as the applicant:

| | DeBillis (5836654) | Applicant 10/822,481 |
|---|---|---|
| Technical Field : | "rigid seat base or pan with a cushion support thereon." | |

Objections of Invention:

| | |
|---|---|
| 1. Highly effective in distributing users weight over seat area. | 1. Not taught in invention |
| 2. Provide highly stable support platform enhancing self-propelling of wheelchair. | 2. Not taught in invention, not a function–not important |
| 3. Provides even low-pressure support in iscial coccyx region (stating specific region) | 3. Not taught in invention, not a function – not important |
| 4. Does not materially increase seat-to-floor height. | 4. Not taught in invention, not a function-not important |
| 5. Has relatively low weight and bulk | 5. Not taught in invention, not a function-not important. |

| Feibus(5,685,257 | Applicant 10/822,481 |
|---|---|
| 1. Support cushion that is absorbent | 1. Applicant never uses the terminology "absorbent". Teaches away from absorbent. Teaches waterproof. |
| 2. Cushion may be easily laundered . | 2. Applicant teaches cover that may be removed and laundered separately. Entire cushion may NOT be laundered. |
| 3. Resists destruction | 3. Taught in invention. |
| 4. Can be inverted should one side become wet or otherwise soiled without full permeation of the pet support cushion. | 4. Teaches away from permeation in any form. Function is to PREVENT ANY permeation. |

**Conclusion:** NEITHER of the prior art references (or references when combined) teach or suggest ALL of the claim limitations as required. *Specifically* neither teach the waterproof, breathable material as taught by the applicant.

**In order to create the applicant's invention, the following steps would need to be taken with the prior art references:**

**To create a 'cushion" from DeBillis similar to the applicant's:**

1. Remove rigid anatomically contoured seat like pan (12) made preferably of alloy aluminum. with top or upwardly facing surface (14) and downwardly facing convex bottom surface (15). Also remove the proximate the front edge (18) of base (12) there is an upwardly convex region (19), this abductor region defines with downwardly sloping sides (20) and two upwardly facing valleys or recess portions (16), plus the inward scallop (22) at the back edge of the pan, all used as "to stabilize the use on the soft cushion".
2. Remove all frame members. Seat supporting frame members (25), which position the seat pan below a plane (17).
3. Remove all mounting clips (24).
4. Remove all extending ribs (26a, 26b, 26c)
5. Convert the preferred form, fluid pouch 40 formed with three compartments 41, 42, 43, these compartments are preferably sealed from each other at seals 44, and 46 to resiliently flexible foam insert.
6. Remove all listed specifications for the foam to be used in cushion.
7. Create the resiliently flexible foam insert from slow recovery visco elastic foam
8. Convert the foam "insert" into a larger piece of foam which now would form a continuous top foam "layer" extending the entire top length and width of the cushion.
9. Remove any contours (37) from foam member (30) - Lower surface (37) preferably is contoured to substantially mate with anatomically contoured, upwardly facing surface (14) of the seat base.
10. Position the slow recover visco elastic foam layer on top of supporting foam layer.
11. Remove all wrinkles (59) from elastomeric envelope (50).
12. Re-design the cover of a hydrophobic material (60) from a shower-cap design covering only a portion of the cushion, to a cover that completely encloses and protects the enclosed foam layers.
13. Convert the composition of envelope (50) from an elastomeric material to a waterproof, breathable material.

14. Remove all air vents (52)
15. Seal envelope around both foam layers.

**To create a 'cover" from Feibus similar to the applicant's:**

1. Remove the stitching (16) from the binding (14).
2. Remove the binding (14).
3. Create a peripheral side wall.
4. Dispose the peripheral side wall between the top surface and bottom surface.
5. Create a resealable closure so said cover may be removed from cushion for washing.

## FINAL CONCLUSION: The prior art references presented by the examiner do not meet the MPEP Section 2143 – Three Part Test for Obviousness

If an examiner is allowed to remove small parts from numerous patents, any patent application can be replicated. It is not permissible to 'cherry pick" numerous items from numerous prior art references in order to create, with impermissible hindsight, a case for obviousness. Especially if the prior art references used for 'cherry picking" are not similar to the applicant's invention in their purpose or function.

I have proven that the prior art references do not meet the MPEP Section 2143 – Three Part Test for Obviousness and respectfully request allowance of the application in view of the arguments presented.

Respectfully Submitted,

Debra L. Holte

**CERTIFICATE OF RECEIPT BY FACSIMILE**

**UNDER 37 CFR 1.6**

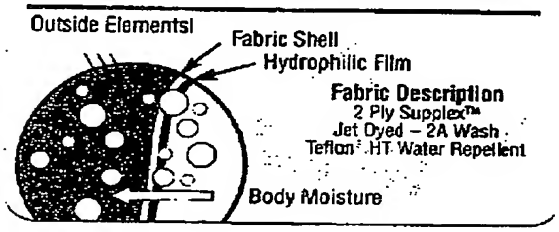
I hereby certify that this correspondence is being transmitted
By facsimile to the U.S. Patent and Trademark Office,
Art Unit: 3643, Fax: 1-571-273-8300,
Alexandria, Virginia 22313 on Nov. 7, 2006.
Date: 11/07/06 Applicant: D Holte.

Application: 10/822,481

Exhibit A

Fabric Label for a waterproof breathable material (currently available in today's marketplace) using hydrophilic function as taught by the applicant.

AvaLite™: the waterproof, breathable fabric strong and light for maximum performance in all your outdoor activities. The special hydrophillic film transmits your body's natural moisture vapor through your garment allowing your body to breathe while you stay dry and comfortable.



Application 10/822,481
Exhibit B

D.E.M.P. DIST. INC. 1538 South Quail St. Lakewood, CO 80232 (303) 986-8853

November 1, 2006

## Specifications:

- Foam is a high resiliency polyurethane foam which has a softness that measures less than 100 lbs using the Indention Load Force Deflection (I.L.D.) test at 25% over 50 square inch area. (ASTM D357).
- Preferably the I.L.D. is about 20lb at 25% to about 60lbs at 65%.

## Response:

There is NO slow recover visco-elastic foam (memory foam) of any formulation currently available on the market today that can fulfill these specifications.

SINCERELY,

PATRICK L. PAIZ
D.E.M.P. DIST. INC.